No. 9544

In the United States Circuit Court of Appeals for the Ninth Circuit

R. W. BROOKS ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND C. A. FIRTH, APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

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OPINION BELOW

The district court wrote no opinion. Its findings of fact and conclusions of law are to be found at pages 129–144 of the record.

JURISDICTION

This is an appeal from a final judgment of the District Court of the United States for the District of Arizona entered on March 11, 1940 (R. 145), adjudging appellants guilty of contempt for the violation of a final decree of said court entered June 29, 1935, and an order of said court pursuant to said decree entered December 9, 1935 (R. 133), in a cause pending in said court entitled "United States of America, plaintiff v. Gila Val-

ley Irrigation District, et al., defendants," and numbered Globe-Equity No. 59. The jurisdiction of the district court was originally invoked under section 24 (1) of the Judicial Code, as amended, 28 U. S. C., sec. 41 (1) (R. 5). The district court retained jurisdiction to administer the decree (R. II, pp. 112–113; Br. App. p. vii).* The present contempt proceedings were instituted pursuant to those provisions of the decree. The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the federal court in Arizona, in a suit brought by the United States to have its direct diversion and storage rights in the waters of the Gila River judicially determined and protected as against other diverters in Arizona and New Mexico (who personally appeared and asked for cross relief), had jurisdiction to inquire into and determine the rights of New Mexico water users so as to prevent them from encroaching on the rights of the United States and the other diverters in Arizona.

2. Whether, in order to prevent the New Mexico defendants from diverting water to the prejudice of the

*The 1935 decree, and the annual reports of Water Commissioner Firth to the district court for the years 1936–1938, which are part of the record, have not been printed as part of the transcript. However, copies of the decree prepared by the Government Printing Office have been filed with the Clerk as Volume II, and mimeographed copies of the reports as Volumes III, IV and V of the transcript (R. pp. iii, 283). References herein will be to the printed or mimeographed copies (R. II, III, IV, V) and also to excerpts from these volumes which have been set out in the appendix to appellants' brief (Br. Appendix) and the appendix to this brief (infra, pp. 69–75). All record citations herein are to Volume I unless otherwise indicated.

downstream users in Arizona, the court had jurisdiction (a) to order the New Mexico diverters to install and maintain locks and measuring devices on their headgates in New Mexico, and (b) to appoint a water commissioner to see that the provisions of the decree were respected by water users in both states.

3. Whether the State of New Mexico was an indispensable party to the suit.

4. Whether an adjudication of the water rights of the New Mexico defendants, when made by the Arizona court for the purpose of protecting direct diversion and storage rights of water users in Arizona, is binding on successors in interest in New Mexico, on the theory (a) that an injunction may be made to bind successors in interest, or on the theory (b) that all New Mexico water users under the Sunset Canal are bound by the provisions of the decree against the Sunset Canal Company.

5. Whether the federal court in Arizona, in a contempt proceeding brought to enforce the aforesaid decree, erred in overruling a motion by certain New Mexico defendants to quash the service made on them in New Mexico as officials of the Sunset Canal Company.

6. Whether the court's judgment that the appellants have disobeyed the decree and subsequent orders of the court and the water commissioner is supported by admissions in the pleadings and by the evidence.

7. Whether the court erred in placing on the appellants "the burden of going forward" with the evidence.

8. Whether the court properly rejected appellants' offer to prove that the diversion of water in New Mexico did not injure the water users in Arizona.

9. Whether the court abused its discretion in imposing a $100.00 fine on each of the appellants rather than in imprisoning them.

STATEMENT

The present contempt proceedings grow out of violation of a decree entered in a suit brought by the Government in 1925 to have its water rights in the Gila River judicially determined.

The Gila River rises in New Mexico and flows in a westerly direction across Arizona. It runs through the San Carlos, Apache, and Gila River Indian Reservations and joins the Colorado River at Yuma (map, R. III, plate 1, following p. 17). The waters of this stream were used by the Indians for irrigation purposes long before the arrival of the white man (R. 6). The early pioneers put the water to a similar use (R. 10). With the increased development of irrigation the question of water priorities became one of great importance.

As early as 1910, the federal Government began an investigation of the situation with a view to protecting the rights of the Pima and other Indians residing on the Gila River Indian Reservation in central Arizona. In 1916 Congress passed legislation which made it possible to effect a partial adjustment of priority claims in that area: it authorized the construction of the Florence-Casa Grande Project for the irrigation of white- and Indian-owned lands in central Arizona, but only on condition that the diversion rights of the interested parties should be satisfactorily adjusted, either by agreement or by court action.[1] The resulting agreement (R. 15–17),

[1] Act of May 18, 1916, c. 125, 39 Stat. 123, 130–131.

while effective as between the parties, did not include water users under other projects further upstream, and these upstream diversions rendered the available water supply inadequate to irrigate the lands in central Arizona.

Therefore, in order to provide additional facilities, Congress in 1924 authorized the construction of the Coolidge Dam and Reservoir, as a part of the San Carlos Project, to impound water for the supplemental irrigation of the Gila River Indian Reservation lands.[2] It was apparent, however, even at the time that this act was passed, that the requirements of irrigable lands along the Gila River exceeded the amount of water normally available for direct diversion. There were, in addition to the 100,000 acres in the San Carlos Project, some 3,000 acres of Indian land at Gila Crossing further downstream, and some 42,000 acres upstream [1,300 acres in the Winkelman Valley, 1,000 acres in the San Carlos Reservation, 32,000 acres in the Safford Valley, and 8,000 acres in the Duncan-Virden Valley] (Map R. III, plate 1). Since the San Carlos Project was located comparatively far downstream, the Government realized that the construction of this costly project would not insure an adequate supply of water for the Gila River Indian Reservation unless the upstream diversions were carefully regulated. To that end the United States in 1925 instituted a suit in the federal district court in Arizona to have its water rights in the Gila River judicially determined (R. 2–25).

[2] Act of June 7, 1924, c. 288, 43 Stat. 475.

In its bill the United States, on behalf of itself and the Pima and Apache Indians, claimed water rights as of various dates: some rights were based on immemorial appropriation by the Indians; other rights were based on the doctrine of the *Winters* case, 207 U. S. 564 (1908); and still other rights were based on subsequent appropriations and purchases (R. 6–23). The Government also claimed a separate right to store waters in the San Carlos Reservoir (R. 21, 23).

Approximately 2,000 persons, individual and corporate, who claimed some right to divert, appropriate, or use the waters of the Gila River, whether in Arizona or New Mexico, were named as parties defendant (R. 4). But the large canal companies which made the actual diversions and supplied water to the individual users in the several districts were the primary defendants. This fact is illustrated by the form of the complaint, the name of the canal company being listed first and separated by a colon from the names of the individual stockholders (water users) of that particular canal, e. g., "Sunset Canal Company: Florentino Billaba, C. M. Brooks, R. W. Brooks [etc.]" (R. 3–4).

The bill alleged that the defendants' claims were in conflict with and adverse to the rights of the United States, and if exercised would so diminish the volume of water in the river as to deprive the United States of its prior rights (R. 24); and that the Government's rights could not be properly ascertained or protected until the rights of all parties were "judicially determined" (R. 24). It was, therefore, prayed that the court, by its decree, "determine" the rights of the par-

ties to the waters of the Gila River and its tributaries, and that "the Court decree to the United States the water rights hereinabove set forth as owned and claimed by the United States, and *quiet its title* therein, and *enjoin said defendants* and each of them from interfering therewith" (R. 25).[3]

The suit was particularly complex for several reasons. In the first place many diverters claimed a certain quantity of water as of one date and an additional amount as of a later date. The value of the later appropriations depended on the available water supply and intervening appropriations made by other claimants. In the second place the dates of individual appropriations within each valley varied considerably, so that it could not be said that the demands of any particular valley as a unit had to be satisfied first. Besides these practical difficulties (generally present in water controversies involving rights in large rivers), there was also a jurisdictional problem caused by the fact that a small part of the Duncan-Virden Valley extends eastwardly across the state line into New Mexico, placing within the latter state approximately 2,800 of the 143,000 acres involved in the litigation. Water for approximately all of these 2,800 acres is diverted by the Sunset Canal Company, a primary defendant, which also carries water into Arizona (R. 3).

Francis C. Wilson (the New Mexico water commissioner) seems to have agreed that the suit should be brought in Arizona, and acted as counsel for the New Mexico defendants (R. 26–28). The several defendants, those in New Mexico as well as those in Arizona, entered

[3] Italics are ours throughout this brief.

a general appearance, either in person or through their counsel. They answered the Government's complaint, and by way of cross-relief asked that their rights be ascertained as against the United States and as among themselves (R. 29–44).

Because of the number of parties involved and the quantity of evidence heard, the litigation continued for a period of ten years. Finally in 1935, on the basis of evidence then available, the parties "adjusted and settled their respective claims as between each other," signed a "stipulation for and consent to the entry of a final decree," and asked the court to adopt as its findings and to enter as its decree the stipulation which set forth "the respective rights of all parties (R. II, p. 1 following decree; Br. Appx. p. vii). The court, pursuant to this stipulation, entered its decree on June 29, 1935, and retained jurisdiction to enforce and implement its decree (R. II, 112, 113; Br. Appx. iv–vii).

The decree describes in detail the nature and extent of the rights owned by each party and the land upon which the water may be used (Art. V, R. II, 12–105; Br. Appx. ii); provides for the appointment of a water commissioner to carry out and enforce its provisions, with power to cut off water from the ditches of persons who disobey his orders; requires each diverter to install and maintain measuring and locking devices (Art. XII, R. II, 112; Br. Appx. iv–v); enjoins all parties, their assigns, successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, from asserting or claiming, as against the parties, any right, title or interest, except the rights determined and allowed in the decree; perpetually enjoins each from diverting, taking or interfer-

ing with the waters of the river so as to prevent or interfere with the diversion or use by other parties as provided in the decree; and provides that the decree shall inure to the benefit of grantees, assigns, and successors in interest of the owners of rights and the parties to the decree (Art. XIII, R. II, 113; Br. Appx. v–vii).

After the entry of the decree the court appointed C. A. Firth as water commissioner and, on December 9, 1935, directed that an annual assessment of 13¢ per acre be collected from each water user to meet the expenses of administering the decree (R. 58). No water was to be delivered "to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre" (R. 59). The commissioner was also ordered and directed to have each party entitled to divert water install, at his or its own expense, adequate and substantial headgates with adequate locking facilities and accurate measuring and automatic recording devices on or before March 1, 1936 (R. 59).

These orders were complied with by the New Mexico as well as the Arizona defendants (R. 138). During the next three years—from January 1, 1936, to January 1, 1939—the waters of the Gila River were apportioned in conformity with the provisions of the 1935 decree and subsequent orders of the court (R. 138–140). During this period the Sunset Canal Company collected the 13¢ assessment from all water users under its system, those in New Mexico as well as those in Arizona (R. 138–139).[4]

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[4] Approximately 95% of the water which is diverted from the Gila River and which is used on lands of the New Mexico defendants passes through the canals of the Sunset Canal Company.

But in the fall of 1938 certain water users in New Mexico, and particularly the officers of the Sunset Canal Company, became dissatisfied with the 1935 decree and appealed to the Interstate Streams Commission of New Mexico for relief from its provisions (R. 223–225). That Commission, after an *ex parte* investigation, decided that the decree was inequitable and void, and instructed the New Mexico State Engineer to take over the administration of the waters of the Gila River (R. 95–97). Acting pursuant to these instructions and asserting that the Arizona court was without jurisdiction, the state engineer purported to establish a water district and appointed a water master to supervise the distribution of the waters of the Gila River among water users in New Mexico (R. 92–93).

The Sunset Canal Company thereupon refused to pay the 13¢ assessment for the coming year (R. 140). Being in default and his demand having been refused, Water Commissioner Firth, on January 1, 1939, locked the headgates of the Sunset Canal Company and refused to deliver any water until the assessments were paid (R. 140).

The Governor of New Mexico, stating that the administration of the river by C. A. Firth was unlawful and an invasion of the sovereign proprietary interests of New Mexico, countered with an order directing the Chief of the State Police to cause Firth to desist from administering the waters of the stream, and put McClure, the State Engineer, in full possession of the facilities for administering the stream (R. 94–95). Firth was requested to hand over the keys to the headgates and other devices, but he refused. The police

officer, on January 4, 1939, cut off the locks and opened the headgate (R. 141, 218). Thereafter the waters were diverted and used by the appellants without regard for the 1935 decree (R. 141–142, 215).

It having become apparent that the New Mexico water users no longer intended to abide by the 1935 decree, Water Commissioner Firth and the United States Attorney for the District of Arizona asked the court below to issue a rule directing the present appellants and certain other New Mexico water users, who were parties to the 1935 decree, to show cause why they should not be adjudged in contempt of court (R. 46–62). The rule was issued (R. 64), responses were filed (R. 77, 99), and evidence was taken (R. 167–278). On February 6, 1940, the district court found that the respondents had violated the terms of the decree and orders of the court and that they were in contempt (R. 108–109). On March 11, 1940, a judgment was entered adjudging the Sunset Canal Company and the present appellants guilty of contempt and fining each of them $100.00 (R. 145–146).

SUMMARY OF ARGUMENT

I

A. That a court has jurisdiction to prevent a defendant from committing acts outside the state which encroach upon rights within the state is well established. *Salton Sea Cases,* 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603; *New Jersey* v. *New York City,* 283 U. S. 473, 482 (1931); *Great Falls Manufacturing Co.* v. *Worster,* 23 N. H. 462

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(1851). The mere fact that the injunction may affect one's rights in, or use of, real property in another state does not deprive the court of jurisdiction. *Massie* v. *Watts,* 6 Cranch 148 (1810); *Western Union Telegraph Co.* v. *Louisville & N. R. Co.,* 201 Fed. 946 (W. D. Ky. 1913), aff'd 207 Fed. 1 (C. C. A. 6, 1913). It therefore follows that the federal court in Arizona, in a suit brought by the United States to have its direct diversion and storage rights in the waters of the Gila River judicially determined and protected as against other diverters in Arizona and New Mexico (who personally appeared and asked for cross relief), had jurisdiction to inquire into and determine the rights of New Mexico water users so as to prevent them from encroaching upon the rights of the United States and the other diverters in Arizona. *Miller & Lux* v. *Rickey,* 127 Fed. 573 (C. C. Nev. 1904), 146 Fed. 574 (C. C. Nev. 1906); *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11 (C. C. A. 9, 1907), 218 U. S. 258 (1910); *Vineyard Land & Stock Co.* v. *Twin Falls, S. R. L. & W. Co.,* 255 Fed. 9 (C. C. A. 9, 1917); *United States* v. *Walker River Irr. Dist.,* 11 F. Supp. 158, 162 (Nev. 1935); *Willey* v. *Decker,* 11 Wyo. 496, 73 Pac. 210 (1903); *Taylor* v. *Hulett,* 15 Idaho 265, 97 Pac. 37 (1908).

The very nature of the subject matter, especially where storage rights are involved, renders it impossible to decide whether rights of diverters in Arizona are being encroached upon without first determining the rights of the New Mexico defendants. And diversion rights in Arizona cannot be adequately pro-

tected except by an injunction restraining the New Mexico defendants from taking water in excess of their lawful rights. Therefore, while the injunction indirectly determines the water rights of users in New Mexico, the whole purpose of the decree is to protect rights within the State of Arizona, a matter which is admittedly within the jurisdiction of the federal court of that state. Any decree less broad would not protect direct diversion and storage rights of the water users in Arizona.

B. The court also had jurisdiction to that same end to require locks and measuring devices to be installed in New Mexico and to appoint a water commissioner to carry out the provisions of the decree. *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9, 27–29 (1917); *Salton Sea Cases,* 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603.

C. The State of New Mexico was not an indispensable party to the decree. A court's power to adjust the rights of the parties on an interstate stream, without the joinder of the states through which the river flows, has been frequently upheld. *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 261 (1910); *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9, 25–26 (C. C. A. 9, 1917); *Howell* v. *Johnson,* 89 Fed. 556, 559 (C. C. Mont. 1898); *Morris* v. *Bean,* 146 Fed. 423, 429–430 (C. C. Mont. 1906), aff'd *Bean* v. *Morris,* 159 Fed. 651 (C. C. A. 9, 1908), aff'd. 221 U. S. 485 (1911); *Finney County Water Users' Ass'n.* v. *Graham Ditch Co.,* 1 F. 2d 650, 651–652 (Colo. 1924). To hold that a state is an indispensable party would

make it impossible for private litigants to protect their appropriation rights in an interstate stream. No such result is required, especially since no interest of the state is adjudicated by a decree fixing the rights of the several appropriators in the stream. *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 103 (1938); *Washington* v. *Oregon,* 297 U. S. 517, 528 (1936).

II

A. Inasmuch as the present appellants were parties to the original decree, it is doubtful whether they can absolve themselves of their contumacious conduct by asserting that the 1935 decree is not now binding on successors in interest in New Mexico. In any event, it is submitted that the decree is in fact binding on successors in interest. Decrees running against successors in interest are frequent in water right cases. *Ahlers* v. *Thomas,* 24 Nev. 407, 56 Pac. 93 (1899); *Gale* v. *Tuolumne County Water Co.,* 169 Cal. 46, 145 Pac. 532 (1914). That a successor in interest may be adjudged in contempt for violating a decree entered by a court of another state is illustrated by the case of *Pacific Live Stock Co.* v. *Rickey,* 8 F. Supp. 772 (Nev. 1934). If an innocent purchaser of water rights in California is bound to take notice of a water suit pending in Nevada, and the Supreme Court has so intimated, *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 262–263 (1910), there would appear to be no reason why a New Mexico successor in interest should not be required to take notice of an Arizona decree enjoining his grantor from impinging upon the rights of appropria-

tors in Arizona. If it be held that the Arizona court's decree may be thwarted by a mere transfer of rights from one New Mexico defendant to his successor in interest, then the forward steps which this Court took in adapting legal theories to realities in the *Miller & Lux* and *Vineyard Land & Stock Company* cases will have been nullified. It will mean that the courts, with the possible exception of the Supreme Court, are impotent to protect downstream users on an interstate stream.

B. Whatever be the effect of an injunction on successors in interest, it is submitted that all New Mexico water users, whether parties to the original suit or not, who use water under the Sunset Canal, are bound by the provisions of the 1935 decree against the Sunset Canal Company. This follows from the fact that a canal or ditch company can sue or be sued on behalf of its water users and the latter will be bound by the ensuing judgment, even though they were not parties to the suit. *Montezuma Canal* v. *Smithville Canal,* 218 U. S. 371, 382 (1910); *La Luz Com. Ditch Co.* v. *Town of Alamogordo,* 34 N. Mex. 127, 134–135, 279 Pac. 72 (1929); *Riverside Water Co.* v. *Sargent,* 112 Cal. 230, 235, 44 Pac. 560 (1896). The Sunset Canal Company was a party to the 1925 litigation (R. 3), and its rights were determined by the 1935 decree (R. II, Article VIII). This means that all New Mexico water users under the Sunset Canal are bound by the decree against the Company.

Because of their conduct during the litigation, and since the decree was entered in 1935, the appellants are estopped to deny the corporate existence of the Sunset Canal Company. *Tulare Irrigation District* v.

Shepard, 185 U. S. 1 (1902). Furthermore, that company is an existing corporation. It was organized in 1903 (R. 241); it has since transacted business, and continues to transact business, as a corporation (R. 131, 143. It was a "quasi public" rather than a "private corporation." *Albuquerque Land Irrigation Co. v. Gutierrez,* 10 N. M. 177, 250, 61 Pac. 357 (1900), aff'd 188 U. S. 545 (1903). Hence, it was not affected by the New Mexico statute of 1921 dissolving all "private corporations" which had failed to file annual reports. It was in any event a "community ditch," which under New Mexico law is suable as a corporation. N. M. Stat. Ann. (Comp. 1929), sec. 151–414; Record 193, 196; *In re Dexter-Greenfield Drainage District,* 21 N. M. 286, 304, 154 Pac. 382 (1915).

III

A. Inasmuch as the Sunset Canal Company, as a body corporate, and Parley P. Jones, R. W. Brooks, and Rachel Jensen, individually, subjected themselves to the jurisdiction of the Arizona court prior to the entry of the 1935 decree, and in view of the fact that a contempt proceeding to enforce a decree is a part of the main action, service *de novo* is not required—notice alone suffices. *Leman* v. *Krentler-Arnold Co.,* 284 U. S. 448 (1932).

B. That the appellants had disobeyed the decree and subsequent orders of the court and the water commissioner, and were therefore in contempt, is apparent from the admissions in the pleadings and the evidence (R. 52, 53, 55, 58–59, 86).

C. The verified affidavits and the order to show cause established a *prima facie* case of contempt. The court was therefore correct in placing upon the respondents "the burden of going forward" with the evidence (R. 167–169). Even if this ruling be construed as requiring them to assume the "burden of proof", it was not erroneous, because the answer admitted violations of the decree and set up defenses which as a matter of law were insufficient. *Oriel* v. *Russell,* 278 U. S. 358 (1929). Theirs was the task of proving matters in confession and avoidance. *In re Cashman,* 168 Fed. 1008 (S. D. N. Y. 1909).

D. The court below properly rejected appellants' offer to prove that the diversion of water in New Mexico did not injure water users in Arizona. A withdrawal of water in excess of rights fixed by a decree cannot be defended by an offer of proof that the excessive withdrawals were not injurious. The other parties may insist upon their adjudicated rights. *Wyoming* v. *Colorado,* 309 U. S. 572, 581 (1940).

E. The fine of $100.00 imposed upon each of the respondents, in order to reimburse the court's officer for attorneys' fees and other expenditures, was entirely proper. *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, 428 (1923). In fixing the fine of each respondent at $100.00, the court did not abuse its discretion. *Board of Trade of Chicago* v. *Tucker,* 221 Fed. 305 (C. C. A. 2, 1915).

F. Congress by statute has conferred upon the federal district courts power to punish contempts of their authority, either by fine or imprisonment, at their discretion. 28 U. S. C. secs. 385, 387. Fines are permis-

sible in civil contempt proceedings. *Feldman* v. *American Palestine Line,* 18 F. 2d 749 (C. C. A. 2, 1927).

ARGUMENT

In their opening brief the appellants argue that the judgment of the court below holding them in contempt is erroneous for twelve reasons. An analysis shows that these arguments are really three in number: (1) those which deny the jurisdiction of the court below to enter a decree affecting water rights in New Mexico (Br. 21–24, 33–35, 24–32); (2) those which assert that the decree is now ineffective because not binding on successors in interest in New Mexico (Br. 33, 42–43); and (3) those which directly challenge the contempt judgment itself (Br. 40–41, 43–52). It is believed that repetition may be avoided in the Government's brief if appellants' twelve arguments are considered under the three headings just mentioned.

I

The 1935 decree is not void for want of jurisdiction and is binding on the New Mexico defendants

Appellants' first line of attack is to challenge the jurisdiction of the court below to enter the decree on which the contempt proceedings were based. They contend that the 1935 decree was *coram non judice* as to water users in New Mexico, for three reasons: (a) because the court in Arizona had no jurisdiction to quiet title to water rights in New Mexico (Br. 21–24); (b) because it had no jurisdiction to order headgates and measuring devices to be installed and supervised

in New Mexico (Br. 33–35); and (c) because the State of New Mexico was an indispensable party (Br. 24–32). These contentions will be considered seriatim.

A. The federal court in Arizona, in order to determine and protect the Government's rights in the waters of the Gila River, had jurisdiction to determine the rights of other claimants, including the New Mexico defendants, and to enjoin each claimant from diverting water in such a way as to encroach upon the superior rights of the other claimants, to wit, in an amount in excess of that determined to be rightfully theirs

When the Government instituted the original action in 1925 to have its water rights in the Gila River judicially determined, it was of course familiar with certain landmark decisions which this Court had theretofore rendered in controversies involving water rights in interstate streams. In fact, cases like *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11 (C. C. A. 9, 1907) aff'd 218 U. S. 258 (1910), and *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9 (C. C. A. 9, 1917), were used as a pattern in preparing the pleadings and prayer for relief in the 1925 litigation. Whether the Government deviated from those precedents may be best determined by analyzing those decisions and comparing the principles there announced with the pleadings and decree in the instant case.

The *Miller & Lux* litigation, in its various stages, is particularly instructive. The facts are these: Miller & Lux (downstream appropriators in Nevada) brought suit in a federal court of that state in 1902 to have their water rights determined and to have the defendants (upper riparian proprietors in Nevada and California) enjoined from diverting the flow of the Walker River in subversion of the plaintiffs' rights. Rickey, a Cali-

fornia defendant, challenged the court's jurisdiction. While conceding that it had no *in rem* jurisdiction over lands and real estate in California, the Nevada court pointed out that it did have *in personam* jurisdiction over the parties and could enjoin the California defendants from diverting water to the prejudice of downstream appropriators in Nevada. *Miller & Lux* v. *Rickey,* 127 Fed. 573 (C. C. Nev. 1904), citing Gould on Pleading (Hamilton ed.) p. 113; *Deseret Irrigation Co.* v. *McIntyre,* 16 Utah 398, 406, 52 Pac. 628 (1898); *Willey* v. *Decker,* 11 Wyo. 496, 73 Pac. 210 (1903); *Lower Kings River Water Ditch Co.* v. *Kings River & Fresno Canal Co.,* 60 Cal. 408, 410 (1882); cf. *El Paso & R. I. Ry. Co.* v. *District Court,* 36 N. M. 94, 8 P. 2d 1064 (1931).

While the above suit was pending in Nevada, and in order to defeat the jurisdiction of that court, Rickey formed the Rickey Land & Cattle Company, assigned his rights in California to the new corporation, which then brought suit in a state court of California to quiet its title to water rights in the Walker River, naming as defendants a number of persons not included in the Nevada litigation. Miller & Lux countered by asking the Nevada federal court to restrain the Cattle Company from the further prosecution of the quiet-title action in California. The injunction was granted, the court pointing out that "the flowing waters of the Walker river" were the subject matter in issue in each case, and that the first court to acquire jurisdiction should make the determination. *Miller & Lux* v. *Rickey,* 146 Fed. 574, 580–588 (C. C. Nev. 1906).

On appeal to this Court, the injunction was sustained. *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11 (C. C. A. 9, 1907). Judge Wolverton, speaking for this Court, declared (pp. 15, 17) that the original suit by Miller & Lux, in its purpose and effect, was one to quiet *their* title to realty in *Nevada,* and, therefore, properly brought in that state. *Conant* v. *Deep Creek & Curlew Val. Irr. Co.,* 23 Utah 627, 66 Pac. 188 (1901). Having jurisdiction over the *res,* and the person of the defendants, the Nevada court had jurisdiction to protect plaintiffs' property from *encroachments* by the defendants, whether those encroachments came from within or without the state. And, in order to determine whether plaintiffs' rights were being encroached upon, it was necessary to consider what rights the defendants had acquired under California law, whether those rights were prior in point of time to those claimed by the plaintiffs, and if not, then to settle and quiet plaintiff's title and rights thereto.

The jurisdiction of the Nevada court to ascertain the priority rights of the various claimants and to enjoin the upstream appropriators in California from diverting water in such a way as to infringe upon the rights of the downstream appropriators in Nevada was subsequently upheld by the Supreme Court. *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258 (1910). Speaking for a unanimous court (the case having been twice argued), Justice Holmes said (pp. 261-263):

> The alleged rights of Miller and Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. * * *

> Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. *To adjust the rights of the parties within the State requires the adjustment of the rights of the others outside of it.* * * *
>
> We are of opinion, therefore, that *there was concurrent jurisdiction* in the two courts, and that the *substantive issues* in the Nevada and California suits *were so far the same* that the the court first seized should proceed to the *determination* without interference, on the principles now well settled as between the courts of the United States and of the States. *Prout* v. *Starr,* 188 U. S. 537, 544. *Ex parte Young,* 209 U. S. 123, 161, 162. * * *
>
> It is urged that the cross bills [filed by intervening defendants] * * * were not maintainable because not in aid of the defenses to the original suit of Miller & Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller and Lux still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller and Lux from working injustice. See further, *Ames Realty Co.* v. *Big Indian Mining Co.,* 146 Fed. Rep. 166. The cross bills being maintainable the jurisdiction in respect of them follows that over the principal bill.

The jurisdictional objections interposed by the California defendants having been thus disposed of by the Supreme Court, the case went back to the federal court in Nevada for a decision on the merits. That court

entered a decree in 1919 adjudging each of the parties to the litigation to be "the owner of the flow and use of the several amounts of water appropriated by them respectively [as set forth in an incorporated schedule]." The decree also contained these provisions: "Each and every party to this suit, and their and each of their servants, agents and attorneys, and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein described, be and each of them hereby is forever enjoined and restrained from claiming any rights in or to the waters of the Walker River * * * except the rights set up and specified in this decree, and each of the said parties is hereby enjoined and restrained from taking, diverting or interfering in any way with the waters of the Walker River or its branches or tributaries so as to in any way, shape or manner interfere with the diversion, enjoyment and use of the waters of any of the other parties to this suit as set forth in this decree * * * The State Engineer of the State of Nevada is hereby appointed a commissioner to apportion and distribute the waters of the Walker River, its forks and tributaries, in the States of Nevada *and California,* in accordance with the provisions of this decree * * *".[5]

The principles of law announced and applied in the *Miller & Lux* case were reaffirmed by this Court in *Vineyard Land & Stock Co.* v. *Twin Falls, S. R. L. & W.*

[5] This decree has withstood subsequent assaults made by the California defendants and by their successors in interest. See *Pacific Live Stock Co.* v. *Rickey*, 8 F. Supp. 772, 773, 777–778 (Nev. 1934). Its validity was conceded in *United States* v. *Walker River Irr. Dist.*, 11 F. Supp. 158, 162 (Nev. 1935).

Co., 245 Fed. 9 (C. C. A. 9, 1917), a case involving conflicting claims to the waters of the Salmon River. That suit was brought in a federal court in Idaho by the downstream appropriators against certain stock raisers upstream in Idaho and Nevada. The trial court concluded that the defendants had some priority rights, described the lands to which their appropriations were appurtenant, and permitted the plaintiffs to impound the surplus waters in their downstream reservoir. The decree required the defendants to install automatic measuring devices which the plaintiffs were authorized to inspect at all times. The court retained jurisdiction to issue necessary orders and to appoint a water commissioner to make distribution in accordance with the terms of the decree. The Nevada defendants appealed, contending that the Idaho court lacked jurisdiction to enter the foregoing decree. In affirming the decree, this Court said (pp. 25, 29):

> The question is presented as to the extent to which the judgment and decree of a court exercising jurisdiction in one state may become operative in another. * * * There is no attempt by the decree to quiet the defendant's title to its appropriations, *but only to determine what they were and to what lands applicable, with a view to doing justice between the parties.* It is furthermore necessary, to protect the plaintiffs against the encroachments of defendant, that the water be measured. The proper measurement is a duty personal to the defendant. It was altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and,

> for the protection of the plaintiffs, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam, and not directly upon the res, and were and are within the court's equitable jurisdiction *to determine and declare.*

It is submitted that the pleadings and the decree in the instant case do not differ in any essential aspects from the pleadings and decrees which this Court approved in the foregoing cases. For example, in its prayer for relief in this case, the Government asked that the Arizona and New Mexico defendants be required to answer the complaint and to "set up fully their claims to the waters" of the Gila River, that the court by its decree "determine" the rights and priorities of the various claimants, and that the court decree to the United States the water rights set forth in its bill of complaint, and "quiet *its* title therein, and *enjoin* said defendants and each of them from interfering therewith" (R. 25). It was of course necessary, before such relief could be granted, to "determine" the priority rights of other claimants, inasmuch as the United States did not base its entire claim on a single immemorial appropriation. It claimed, for example, additional water rights with priorities between 1846 and 1924, including a storage right sufficient to fill the Coolidge Reservoir (1,285,000 acre feet)—the latter with an alleged priority not later than 1896 (R. 22–23).[6] In order

[6] In the consent decree the priority date as against the defendants in this decree was fixed as of 1924 (R. II, 105; *infra* p. 69).

to determine just what rights the Government acquired under these later appropriations, it was necessary for the court to ascertain what intervening rights had been perfected by the several defendants, and if the reservoir was to have any utility to see that no unlawful diversions were made upstream. Since the defendants answered the complaint and asked for cross-relief as against the Government and as against each other, there was no reason why the court below, with personal jurisdiction over all parties, should not enjoin each and every defendant from interfering with the water rights of the other parties. Similar cross-relief in favor of the several defendants was approved by the Supreme Court in the *Miller & Lux* case, 218 U. S. 258, 263 (1910); see also *Rickey Land & Cattle Co.* v. *Wood,* 152 Fed. 22, 24–25 (C. C. A. 9, 1907); *Ames Realty Co.* v. *Big Indian Mining Co.,* 146 Fed. 166 (C. C. Mont. 1906).

Nor did the consent decree which the court below entered on June 29, 1935, differ materially from the Walker River (Miller & Lux) and Salmon River decrees. The 1935 decree follows almost verbatim the language used in the Walker River decree (*supra,* p. 23). It states that "each and all of the parties, . . . their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any

thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters . . . by the owners of prior or superior rights therein as defined and established by this Decree (R. II, 113; Br. Appx. pp. v–vi)." This decree, like the Salmon River decree, provided for the installation of automatic measuring devices, and like both the Salmon River and Walker River decrees it provided for the appointment of a water commissioner to see that all diversions conformed to the decree. Any decree less broad would not have prevented encroachments on the Government's direct diversion and storage rights in Arizona.

If the Nevada court and the Idaho court had jurisdiction to enter the decrees they did, and this Court has so held, then it is submitted that the court below had jurisdiction to enter the 1935 decree which defendants are now attacking. In each of the three cases, the suit was commenced by a downstream appropriator in the State where his land was situated. In each case some water was being diverted upstream for use on lands located in another state, and in each case the upstream diverters were joined as parties defendant. And in each case the court, after obtaining personal jurisdiction over the defendants, "determined" or "adjusted" the rights of the upstream proprietors as well as the downstream appropriators, and on the

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basis of these "determinations" perpetually enjoined the defendants and their successors from diverting water in any manner other than that specified in the decree. It is therefore apparent that the 1935 decree conforms to the established and approved precedents.

Furthermore, these precedents are sound. It is well established that a court has jurisdiction to prevent a defendant from committing acts outside the state which encroach upon property rights within the state. *Salton Sea Cases,* 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603; *Great Falls Manufacturing Co.* v. *Worster,* 23 N. H. 462 (1851); *New Jersey* v. *New York City,* 283 U. S. 473; 482 (1931); cf. *Thayer* v. *Brooks,* 17 Ohio 489 (1848). Because of the very nature of water right controversies, especially where storage rights are involved, it is impossible to decide whether rights within one state are being encroached upon without first determining the extent of the defendants' rights in the other state. And in order to protect direct diversion and storage rights within a state it is necessary to prevent the upstream defendants in another state from taking water in excess of their lawful rights. Therefore, while an injunction may in effect determine the water rights of users in the upper state, the whole purpose of such a decree is to protect rights within the state, a matter which is admittedly within the jurisdiction of a court of equity. The mere fact that the injunction may affect the use to which a defendant may put his property in another state does not deprive a court of equity of jurisdiction. Injunctions and decrees in one state frequently restrict one's use of, or rights in, real property in another state. *Massie* v.

Watts, 6 Cranch 148 (1810); *Jamestown* v. *Pennsylvania Gas Co.,* 264 Fed. 1009 (W. D. N. Y. 1920), 1 F. 2d 871 (C. C. A. 2, 1924); *Western Union Telegraph Co.* v. *Louisville & N. R. Co.,* 201 Fed. 946 (W. D. Ky. 1913), affirmed 207 Fed. 1 (C. C. A. 6, 1913); *Niagara Falls International Bridge Co.* v. *Grand Trunk Ry. Co.,* 241 N. Y. 85, 148 N. E. 797 (1925).

In somewhat analogous situations the courts have not hesitated to exercise jurisdiction even though their decrees affected real property in another jurisdiction. For example, in mortgage foreclosure cases, the courts have ordered railroad, bridge, and canal properties to be disposed of as an economic unit notwithstanding the fact that a part of the property involved was situated in another state. *Muller* v. *Dows,* 94 U. S. 444 (1876); *International Bridge Co.* v. *Holland Trust Co.,* 81 Fed. 422 (C. C. A. 5, 1897); *Brown* v. *Chesapeake and Ohio Canal Co.,* 73 Md. 567 (1890).

Similarly, in cases where the several users of water within a state do not all reside in the same county, the state courts have repeatedly held that a county court's jurisdiction to determine water rights does not stop at the county line. *El Paso & R. I. Ry. Co.* v. *District Court,* 36 N. M. 94, 8 P. 2d 1064 (1931); *Lower Kings River Water Ditch Co.* v. *Kings River & Fresno Canal Co.,* 60 Cal. 408, 410 (1882); *Deseret Irrigation Co.* v. *McIntyre,* 16 Utah 398, 406, 52 Pac. 628 (1898).

Decrees determining the rights of numerous users in the waters of an interstate stream have been variously explained. There are three theories: (1) that the decree operates *in rem,* or *quasi in rem,* even as to lands situated in another state; (2) that the decree is one *in*

personam insofar as it affects water rights in another jurisdiction; and (3) that the decree in a water rights case is *sui generis.*

Although the first concept might at first blush appear to run counter to the traditional notion that the courts of one state cannot quiet title to real estate in another jurisdiction, it must be remembered that the sole purpose of the determination is to prevent encroachments on rights downstream. And the Supreme Court's opinion in the *Miller & Lux* case supports the theory that a court in water rights cases may enter a decree which has a substantially *in rem* effect even as to persons who are using water in another state. Mr. Jstice Holmes in that case pointed out that the rights of the several parties "cannot be brought within the same jurisdiction," and that "full justice cannot be done and anomalous results avoided unless *all the rights* of the parties before the court . . . are taken in hand," inasmuch as the adjustment of the rights of the parties within the state requires "*the adjustment* of the rights of the others outside of it." He therefore concluded that "there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were *so far the same* that the court first seized should proceed to the *determination* without interference." *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 262 (1910).

The Supreme Court therefore sustained an injunction prohibiting the prosecution in California of a strictly *in rem* suit to quiet title, on the theory that the substantive issues in the California and Nevada cases were substantially the same. If the Nevada court could not determine the relative rights of the California

defendants, then clearly they had a right at any time to start a quiet title suit in California, because it is well established law that a federal court will not enjoin proceedings in a state court unless the issues in both cases are similar to a point of "substantial identity." *Pacific Live Stock Co.* v. *Oregon Water Rd.*, 241 U. S. 440, 447 (1916). "The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline* v. *Burke Constr. Co.,* 260 U. S. 226, 230 (1922). Therefore, in sustaining the Nevada injunction, the Supreme Court in effect held (1) that the Nevada court had power to determine and adjudicate the rights of every water user represented in the Nevada proceedings, no matter where his use took place, and (2) that the decision of the Nevada court would be controlling in any subsequent proceeding in California.[7]

The second, or more traditional view, is that the decree operates *in personam* as to those defendants using water from the same stream in another state. Numerous decisions support this view. *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9 (C. C. A. 9, 1917); *Miller & Lux* v. *Rickey,* 127 Fed. 573 (C. C. Nev. 1904); *Taylor* v. *Hulett,* 15 Idaho 265, 272, 97 Pac. 37 (1908); *cf. Willey* v. *Decker,* 11 Wyo. 496, 538–547, 73 Pac. 210 (1903); *Conant* v. *Deep Creek*

[7] On this latter point, the Nevada court had said: "The suits in this court will quiet and settle the title or *rights* of the respective parties to the *flowing waters* of the Walker river." *Miller & Lux* v. *Rickey*, 146 Fed. 574, 588 (C. C. Nev. 1906). The Supreme Court's affirmance of the injunction can only be justified on a like view of the Nevada court's jurisdiction.

& Curlew Val. Irr. Co., 23 Utah, 627, 66 Pac. 188 (1901); *Albion-Idaho Land Co.* v. *Naf. Irr. Co.,* 97 2d 439 (C. C. A. 10, 1938).

The third view, that decrees determining water rights are *sui generis,* is supported by this Court's decisions in the *Miller & Lux* litigation: "A suit respecting water appropriations from a stream is *sui generis,* and it may, and does frequently, happen that, in order fully to protect the rights of one appropriator against those of another, it is necessary to *determine* also the rights of the former, not only with reference to those of that other, but also with reference to still others upon the same stream." *Rickey Land & Cattle Co.* v. *Wood,* 152 Fed. 22, 24 (C. C. A. 9, 1907), affirmed *sub nom. Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 263 (1910); see also *Ames Realty Co.* v. *Big Indian Mining Co.,* 146 Fed. 166 (C. C. Mont. 1906); *Union Mill & Mining Co.* v. *Dangberg,* 81 Fed. 73, 88, 119 (C. C. Nev. 1897). Since the relations between different appropriators on the same stream are interdependent, "one appropriator cannot always be fully protected against the injunctive process of another, unless at the same time he has his own rights *ascertained* and *determined* with relation to still others." *Rickey Land & Cattle Co.* v. *Wood,* 152 Fed. 22, 25 (C. C. A. 9, 1907). The "flowing waters" of the river constitute the subject matter of the litigation in water-right cases. *Ames Realty Co.* v. *Indian Mining Co.,* 146 Fed. 166, 168, 170 (C. C. Mont. 1906); *Miller & Lux* v. *Rickey,* 146 Fed. 574, 585 (C. C. Nev. 1906). "The water in the stream, which has a propensity to seek its level, and will continue its current to the sea, is in strict reality the ver-

itable thing in controversy. It knows not imaginary state or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use." *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11, 17 (C. C. A. 9, 1907).

But whether the decree be viewed as *in rem, in personam,* or *sui generis,* it is evident that the 1935 decree is in all essential respects identical with previous decrees approved by this Court. The decree is not to be vitiated by calling it an *in rem* decree quieting title to lands in New Mexico (Br. 21–24). The "tyranny of labels" all too often thwarts the growth and development of the law. The principles announced by this Court in *Rickey Land & Cattle Co.* v. *Miller & Lux* and in *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.* have withstood the test of time; they are sound; they are conducive to justice; they end vexatious litigation. There is no reason why this Court should recede from the doctrines there announced, and since accepted in other jurisdictions. *Taylor* v. *Hulett,* 15 Idaho 265, 269–272, 97 Pac. 37 (1908); *Jamestown* v. *Pennsylvania Gas Co.,* 264 Fed. 1009, 1011 (W. D. N. Y. 1920) aff'd. 1 F. 2d 871 (C. C. A. 2, 1924); *Louisville & N. R. Co.* v. *Western Union Telegraph Co.,* 207 Fed. 1, 8 (C. C. A. 6, 1913); *Niagara Falls International Bridge Co.* v. *Grand Trunk Ry. Co.,* 241 N. Y. 85, 148 N. E. 797 (1925).

Certainly the tenth circuit's decision in *Albion-Idaho Land Co.* v. *Naf Irr. Co.,* 97 F. 2d 439 (C. C. A. 10, 1938), dictates no contrary conclusion. While the result reached in that case was eminently just, it is believed that the court was too cavalier in its treatment of the Hart decree. And it is to be noted that the decree

in the *Albion* case did in reality affect individual priorities in Idaho, the very thing which the circuit court said could not be done. Their statement that the federal district court of Utah could only determine the aggregate rights of the users in Idaho and not their individual priorities is illogical, especially if applied to the converse situation where a court in a downstream state is seeking to prevent wrongful diversions upstream. A decree determining the individual rights of the foreign group and enjoining each member individually from diverting more than the amount decreed is no more in excess of the court's jurisdiction than one determining the aggregate rights of the foreign group and enjoining them jointly from diverting in excess. If a court has jurisdiction in the latter case, it has jurisdiction in the former. Moreover, such a decree only gives partial protection to a plaintiff, as against upstream diverters, since his right is a right against each individual water user on the stream, to have each user refrain from diverting an amount of water greater than that to which he is legally entitled, to the injury of the plaintiff. This is especially true in this case because the Government has storage rights as to all waters which were unappropriated in 1924. A decree which determines only the plaintiff's right against a group of appropriators jointly will be of no assistance as against excessive diversions by any one of the foreign group of appropriators, and it may also be highly prejudicial to all members of the group whose aggregate rights are decreed. Cf. *Rickey Land & Cattle Co.* v. *Wood,* 152 Fed. 22, 24 (C. C. A. 9, 1907) ; *Ames Realty Co.* v. *Big Indian Mining Co.*, 146 Fed. 166 (C. C. Mont. 1906).

It is therefore submitted that on both reason and authority the court below, in protecting appropriators within the state of Arizona, had jurisdiction at the same time and for that purpose to inquire into and determine rights and priorities of the New Mexico defendants so as to prevent them from encroaching upon the rights of the Arizona appropriators.

B. The federal district court of Arizona had jurisdiction to require the Sunset Canal Company to install and maintain locks and measuring devices on its headgates in New Mexico and to appoint a commissioner to see that the provisions of the decree were respected by water users in New Mexico

That a court of equity, with personal jurisdiction over a defendant, can issue a *negative* injunction restraining him from so using his property in another state as to injure plaintiff's property within the state, has long been conceded. *Great Falls Manufacturing Co.* v. *Worster,* 23 N. H. 462 (1851); *Western Union Telegraph Co.* v. *Louisville & N. R. Co.,* 201 Fed. 946 (W. D. Ky. 1913), affirmed 207 Fed. 1 (C. C. A. 6, 1913); *Niagara Falls International Bridge Co.* v. *Grand Trunk Ry. Co.,* 241 N. Y. 85, 148 N. E. 797 (1925). But until quite recently there have been some who doubted an equity court's power to order *affirmative* acts to be done in another jurisdiction. See 1 Beale, Conflict of Laws (1935), pp. 415, 431–434. That narrow concept of a court's power to accomplish justice was repudiated by this Court in the famous *Salton Sea Cases,* 172 Fed. 792 (C. C. A. 9, 1909), certiorari denied 215 U. S. 603. In those cases, it wil be recalled, this Court affirmed a decree of the district court in California ordering the defendants, who were diverting waters from the Colorado River, to install headgates

in Mexico adequate to prevent the waters of that river from flooding plaintiff's salt mines in California. Similarly, in *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9, 29 (1917), this Court affirmed a decree of the Idaho court ordering the Nevada defendants to install automatic devices for the measurement of water in Nevada.

Largely because of this Court's trail-blazing decisions in the *Miller & Lux* and the *Salton Sea Cases,* Professor Beale in 1913 observed that "the federal courts show a tendency to transcend state lines in the exercise of equity jurisdiction."[8] This tendency has since spread to other courts.[8a] In fact, the authorities now generally agree that an equity court may commend a person before it to do an act in another state, and the fact that the act is to be done abroad goes merely to the discretion of the court in issuing the decree and not to its jurisdiction.[9]

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[8] Jurisdiction of Courts over Foreigners, 26 Harv. L. Rev. 283, 295 (1913).

[8a] A classic illustration is *Madden* v. *Rosseter*, 114 Misc. 416, 187 N. Y. S. 462 (1921). In that case the New York supreme court appointed a receiver and ordered him to proceed to California, there to take possession of a thoroughbred race horse (through legal process if necessary), and to return the horse to the plaintiff in time for the Kentucky races.

[9] Note, 35 Harv. L. Rev. 610 (1922); note, 20 Ill. L. Rev. 594, 599 (1926); Messner, Jurisdiction of Equity, 14 Minn. L. Rev. 494, 517–529 (1930); Walsh, Equity (1930), sec. 18. The cases in point are collected in 1 Chafee and Simpson, Cases on Equity (1934), pp. 208, 210; Note, 17 Harv. L. Rev. 572 (1904); Note, 23 Harv. L. Rev. 390 (1910); Note, 5 Ill. L. Rev. 442 (1911); Note, 31 Harv. L. Rev. 646 (1918); Note, 27 Yale L. J. 946

Since no single court has physical jurisdiction of the entire Gila River, justice can only be done by having all rights determined and enforced by one court. If, in order to accomplish that end, affirmative but lawful acts must be done abroad, there is no reason why their performance should not be ordered.

It cannot be said that the provisions of the 1935 decree are in conflict with the law of New Mexico. That state must respect prior water rights acquired by downstream appropriators, where the United States is claiming rights acquired and vested under federal law before New Mexico became a state. *Winters* v. *United States,* 207 U. S. 564 (1908); *Bean* v. *Morris,* 159 Fed. 651, 654 (C. C. A. 9, 1908); *Howell* v. *Johnson,* 89 Fed. 556 (C. C. Mont. 1898); *Anderson* v. *Bassman,* 140 Fed. 14, 20 (C. C. N. D. Cal. 1905). "* * * the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right." *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11, 18 (C. C. A. 9, 1907). The usufructuary right is coextensive with the stream. There is certainly no statute of New Mexico which imposes upon her officials a mandatory duty to administer the waters of the Gila River in derogation

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(1918); Note, 6 Cornell L. Q. 423 (1921); Note, 30 Yale L. J. 865 (1921); Note, 71 A. L. R. 1351 (1931). The American Law Institute in its Conflict of Laws Restatement (1934) states the rule in this fashion: "§ 94. A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed."

of the prior rights of downstream water users. We should indulge the presumption that the State of New Mexico does not intend to nullify the lawful adjudications of the federal courts. In all their acts to date, the officers of the state have been careful to declare that the contemplated action was being taken because they believed the Arizona decree to be invalid (R. 231, 238–239). Therefore, we may assume, once this Court reaffirms the validity of the 1935 decree, that the New Mexico state officials will respect its provisions. They have no lawful authority to do otherwise.

In short, both reason and precedent make it clear that the court below had jurisdiction to require the Sunset Canal Company to install and maintain locks and measuring devices on its headgates in New Mexico, and to appoint a commissioner to see that the decree was properly administered. That decree is not to be nullified by "labelling" it a decree operating "directly on the river and canals in New Mexico" (Br. 33–37). This Court in *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.*, 245 Fed. 9, 29 (C. C. A. 1917), was careful to point out that a decree requiring headgates to be installed and all diversions carefully checked operated "*in personam,* and not directly upon the *res,*" and that such a decree is within a court's "equitable jurisdiction to determine and declare."

C. The State of New Mexico was not an indispensable party to the decree

It is not now open to the appellants to assert that the State of New Mexico was an indispensable party. The decree was entered with their consent. For three years

they respected its provisions. It is no justification now, after they disobey the decree, to say that the State of New Mexico was not a party. The absence of an indispensable party from a proceeding, while it may be urged at any stage of the proceeding itself, prior to the entry of the final decree, does not go to the jurisdiction of the court to enter the decree. *Rood* v. *Goodman,* 83 F. 2d 28, 32 (C. C. A. 5, 1936) certiorari denied 299 U. S. 551; *State of Washington* v. *United States,* 87 F. 2d 421, 427, 431 (C. C. A. 9, 1936), *Elemendorf* v. *Taylor,* 10 Wheat, 152, 166 (1825); *Mallow* v. *Hinde,* 12 Wheat. 193, 197 (1827). The rights and obligations of the appellants, as respects the United States and the other parties to the decree, were fully litigated and determined. Accordingly, the defense that the decree did not determine the rights of New Mexico is not now available to the appellants as a defense to the contempt proceedings.

Furthermore, the State of New Mexico was not an indispensable party. In several cases the courts have protected the owner of a water right in one state against diversions under rights claimed in another state,[10] but

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[10] *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258, 261 (1910); *Bean* v. *Morris*, 221 U. S. 485 (1911), affg. 159 Fed. 651 (C. C. A. 9, 1908), affg. 146 Fed. 423, 429–430 (C. C. S. Mont. 1906); *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.*, 245 Fed. 9 (C. C. A. 9, 1917); *Howell* v. *Johnson*, 89 Fed. 556, 559 (C. C. Mont. 1898); *Hoge* v. *Eaton*, 135 Fed. 411 (C. C. Colo. 1905); *Anderson* v. *Bassman*, 140 Fed. 14 (C. C. N. D. Cal. 1905); *United States* v. *Walker River Irr. Dist.*, 11 F. Supp. 158 (Nev. 1935); *Taylor* v. *Hulett*, 15 Idaho 265, 97 Pac. 37 (1908); *Willey* v. *Decker*, 11 Wyo. 496, 73 Pac. 210 (1903); see *Conant* v. *Deep Creek & Curlew Valley Irrigation Co.*, 23 Utah 627, 66 Pac. 188 (1901).

in none of these was it intimated that either state was an indispensable party to the controversy. On the contrary in *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 261 (1910), in *Morris* v. *Bean,* 146 Fed. 423, 429–430 (C. C. Mont. 1906), aff'd. *Bean* v. *Morris,* 159 Fed. 651 (C. C. A. 9, 1908), aff'd. 221 U. S. 485 (1911), and in *Finney County Water Users' Ass'n.* v. *Graham Ditch Co.,* 1 F. 2d 650, 651–652 (Colo. 1924), it was unsuccessfully contended that the water right owner may be protected against diversions in another state only through a suit instituted by one state against another in the Supreme Court. In *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9, 25–26 (C. C. A. 9, 1917), and in *Howell* v. *Johnson,* 89 Fed. 556, 559 (C. C. Mont. 1898), the interest of the state was unsuccessfully asserted as a bar to a suit by a downstream appropriator to enjoin excessive diversion by an upstream diverter in another state. In all these cases the court's power to adjust the rights of the parties, without joinder of the state, was upheld.

This result is just and logical. Obviously, if either New Mexico or Arizona is an indispensable party in this case, the water right owners on an interstate stream can never have judicial protection against excessive diversions in another state, except with the consent of both states, or in the limited class of cases in which a state may be made party to a suit within the original jurisdiction of the Supreme Court. In order to avoid such a failure of justice, the courts originated the distinction between necessary parties, who must be joined only if they can be reached, and indispensable parties

who must be joined before a court of equity will proceed. As stated in *Stanley* v. *Schwalby,* 147 U. S. 508, 518 (1892); *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 451 (1882), the courts, out of a desire to do justice, tend to go a long way in holding the state not an indispensable party. This decree will not be regarded in a subsequent suit as binding on the states of New Mexico and Arizona, who were not parties to the decree. *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 103 (1938); *Washington* v. *Oregon,* 297 U. S. 517, 528 (1936); cf. *Arkansas* v. *Tennessee,* 246 U. S. 158, 176 (1918); *Fowler* v. *Lindsey,* 3 Dall. 411 (1799). The policy of avoiding multiplicity of suits will require the joinder of an available person as a necessary party, but it is not a sufficient consideration to make him indispensable. *Mallow* v. *Hinde,* 12 Wheat. 193, 197 (1827); cf. *Elmendorf* v. *Taylor,* 10 Wheat. 152, 166 (1825).[11]

In citing *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 262, and 1 Wiel, Water Rights in the Western States (3d ed. 1911) p. 364, for the proposition that the decree is not valid as to the New Mexico defendants without the consent of the State of New Mex-

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[11] The present case is closely analogous to those in which private parties sue to establish title or recover possession of land, where the suit involves the location of a boundary line between states. Such suits have always been entertained in the federal and state courts without requiring the presence of either state. *Handly's Lessee* v. *Anthony,* 5 Wheat. 374 (1820); *Harcourt* v. *Gaillard,* 12 Wheat. 523 (1827); see *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 726–727 (1838); *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 111 (1938).

ico (Br. 27–28), appellants mistake the purport of the language of Justice Holmes in the *Miller & Lux* case. That language does not mean that a joint commission must be set up between the states as a prerequisite to the enforcement in one state of water rights arising in another. If this were required, the Supreme Court's decision, both in the *Miller & Lux* case and in *Bean* v. *Morris,* 221 U. S. 485 (1911), could not be sustained, because in neither of those cases was there such a joint commission. In those cases Justice Holmes regarded a concurrence of the two states as being necessary to create private rights and obligations across their common boundary line (218 U. S. 262; 221 U. S. 486), but the concurrence was found in the fact that the laws of neither state excluded such rights and that the water law of both states was similar. *Bean* v. *Morris, supra,* p. 487. In the instant case, the doctrine of prior appropriation prevails in both Arizona and New Mexico.[12] Where such doctrines exist, "the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement." *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 262 (1910); *Hoge* v. *Eaton,* 135 Fed. 411 (C. C. Colo. 1905).

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[12] *Arizona: Clough* v. *Wing*, 2 Ariz. 371, 377–383, 17 Pac. 453 (1888), see *Water Conserv. Dist. No. 1* v. *Cotton Co.*, 39 Ariz. 65, 75, 77, 4 P. 2d 369 (1931).

New Mexico: Snow v. *Abalos*, 18 N. M. 681, 693, 140 Pac. 1044 (1914); *Albuquerque Land Irrigation Co.* v. *Gutierrez*, 10 N. M. 177, 240, 61 Pac. 357 (1900); N. M. Const., Art. XVI (1911); N. M. Stat. Ann. (Comp. 1929), sec. 151–101; Act of March 3, 1877, c. 107, 19 Stat. 377.

New Mexico has not, as appellants contend, taken such control of the Gila River as to make the decree ineffective because of the state's absence. New Mexico legislation has established the office of state engineer, whose supervision of the waters of the state must be in accordance with "the adjudications of the courts." N. M. Stat. Ann. (Comp. 1929) sec. 151–112. It appears from the record that if the Arizona federal court is held to have jurisdiction to enter the decree it did, the New Mexico officials will respect the decree (R. 231, 238–239). It is to be presumed state officials will always respect the lawful adjudications of the federal courts.

In brief, the jurisdictional objections to the 1935 decree are without merit: The Arizona court had jurisdiction to determine the water rights of appropriators in Arizona and to prevent the New Mexico defendants from interfering therewith. Whether rights in Arizona were being encroached upon could not be determined until the rights of the New Mexico defendants had been determined. And to prevent interference with the decreed rights in Arizona, it was necessary that the diversions in New Mexico be measured and supervised. The court below therefore had jurisdiction to enter the decree it did against water users in New Mexico. And since no rights of New Mexico are adjudicated by the decree, the state was not an indispensable party. Hence, appellants' contention (Br. 21) that the court below should have vacated its 1935 decree insofar as it affects water rights in New Mexico is without merit.

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II

The 1935 decree is binding on successors in interest in New Mexico

Appellants, as their second main argument, contend that even if the 1935 decree was binding on the original New Mexico defendants, it is not binding on their successors in interest, and assert that one-half of the water rights decreed to the New Mexico defendants have passed to successors in interest. And, since the decree is not now binding as to all New Mexico water users, they say it can be enforced against none (Br. 33, 42–43).

No successors in interest are included in the contempt judgment. Each of the present appellants was a party to the original decree. It is no defense for them to say that someone else might not be bound by the decree. The situation is not unlike that which frequently arises when some of the parties to a decree leave the jurisdiction. The decree is not thereby rendered any the less binding as to persons still subject to the court's process. In the instant case the court expressly retained jurisdiction after it entered its decree in 1935 (R. II, 112–113; Br. Appx. vii). Each of the present appellants was a party to that suit, and each of them has answered the citation for contempt. They cannot absolve themselves of their contumacious conduct by asserting that rights decreed to other New Mexico water users have since been transferred to successors in interest. It is thus apparent that the argument of appellants that successors in interest are not bound by the decree is not available to the present appellants. But inasmuch as the primary purpose of the present

contempt proceeding is to enforce the 1935 decree as against the New Mexico water users in general, and inasmuch as appellants have challenged its enforceability as respects successors in interests, it is hoped that this Court will dispose of appellants' argument respecting successors in interest on the broad grounds hereinafter mentioned.

It is submitted that the decree is just as binding on successors in interest as it was on the original New Mexico defendants, for the following reasons:

A. An injunction against "successors in interest" is binding

The decree in the instant case enjoins "each and all of the parties * * * their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors" from claiming or diverting water in any manner other than that fixed by the decree (R. II, 113; Br. Appx. v–vi). Such an injunction is effective not only as against the party defendant, but also a successor in interest who has notice of its provisions. *In re Lennon,* 166 U. S. 548, 554 (1897); *Ahlers* v. *Thomas,* 24 Nev. 407, 56 Pac. 93 (1899); *Gale* v. *Tuolumne County Water Co.,* 169 Cal. 46, 145 Pac. 532 (1914); *Lake* v. *Superior Court,* 165 Cal. 182, 131 Pac. 371 (1913); 2 High on Injunctions (4th ed. 1905), sec. 1440a; 1 Freeman on Judgments (5th ed. 1925), sec. 439, p. 965; 32 C. J. "Injunctions," p. 490. In *Ahlers* v. *Thomas, supra,* an injunction had been entered enjoining the diversion of water in a stream by the defendants and their successors. Ahlers, as successor to the defendants, was found guilty of contempt for violating the decree. He contended that the injunction was not bind-

ing upon him because he was not a party to the proceeding. The court held (p. 408):

> The general rule is that judgments are binding only upon parties, but there are exceptions as in the case of privies. When a judgment has been rendered between the parties, they are bound by it; and, to give full effect to the principle by which the parties are held bound by it, all persons who are represented by the parties, and claim under them, or are privy to them, are equally concluded by the same proceedings.

The *Ahlers* case cannot be explained as an *in rem* decree, for it is well established that a decree in a water rights case does not bind interests not represented in the litigation, as a strictly *in rem* proceeding would. The injunction in that case therefore operated *in personam,* like most injunctions do. If it binds a successor in interest to a defendant within the state, there would appear to be no reason why it should not bind a successor in interest to a defendant in another state.

That a successor in interest to a water user in another state may be adjudged in contempt for violating an injunction against his predecessor is illustrated by the case of *Pacific Live Stock Co.* v. *Rickey,* 8 F. Supp. 772 (Nev. 1934). That case involved the decree which the Nevada court had entered in 1919 fixing the rights of all the Nevada and California defendants in the *Miller & Lux* litigation. After the decree was entered, the Antelope Valley Mutual Water Company acquired the rights of one of the California defendants, and diverted water in violation of the decree. The Nevada District Court held the successor company in contempt. This holding is in accord with principles announced by

the Supreme Court in the *Miller & Lux* case, 218 U. S. 258 (1910).[13] There the argument was made (p. 261) that the doctrine of *lis pendens* should not affect land in another jurisdiction. This contention was rejected (pp. 262–263), Justice Holmes intimating that an innocent purchaser might "be confined to asserting its rights in the pending cause." If a California purchaser is required to take notice of a pending water right suit in Nevada and come in and defend or be bound by the decree against his grantor, it would naturally follow that a New Mexico purchaser should be required to take notice of a final decree enjoining his grantor from claiming water rights in derogation of other water users. Cf. *Miller & Lux* v. *Rickey,* 146 Fed. 574–585 (C. C. Nev. 1906).

If a decree in an interstate water suit, with hundreds of claimants involved, ceases to be binding the moment one defendant decides to transfer his rights to a third party, the decree is indeed worthless. A court's powers are not so limited. *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 262–263 (1910).

B. All New Mexico water users, whether parties to the original suit or not, who use water diverted by the Sunset Canal Company are bound by the provisions of the decree determining the diversion rights of that company

Nearly all water used in the Virden Valley in New Mexico is diverted by the Sunset Canal Company and is distributed through its ditches. The Sunset Canal Company was made a primary defendant in the 1925 litiga-

[13] Appellants' quotation from that case to a contrary effect is a quotation from Mr. Justice Holmes' summary of the petitioner's argument (pp. 260–261) and not from the court's conclusions in that case (pp. 262–263).

tion (R. 3). Out of an abundance of caution, the individual users of water from the Sunset Canal were also named (R. 3–4). The Sunset Canal Company and the individual users entered an appearance, answered the complaint, and asked for cross-relief (R. 29–45). Under the decree the Sunset Canal Company, and the company alone, was authorized to divert water from the Gila River for all lands under its canal system (R. II, 106; Br. Appt. p. iii). While the decree, primarily for purpose of convenience in determining priorities, sets forth the amount of water each user was entitled to, it did not purport to adjudicate all contract rights between the various canal companies and their respective members (R. II, 112, *infra,* p. 70).

The Sunset Canal Company was made a primary defendant and the decree was made to run against it for a purpose. It is black letter law in the western states that a canal or ditch company can sue or be sued on behalf of its water users and the latter will be bound by the ensuing judgment, even though they were not parties to the suit. *Montezuma Canal* v. *Smithville Canal,* 218 U. S. 371, 382 (1910); *La Luz Com. Ditch Co.* v. *Town of Alamogordo,* 34 N. M. 127, 134–135, 279 Pac. 72 (1929); *Riverside Water Co.* v. *Sargent,* 112 Cal. 230, 235, 44 Pac. 560 (1896); *Arroyo D. and W. Co.* v. *Baldwin,* 155 Cal. 280, 285–286, 100 Pac. 874 (1909); *Town Sterling* v. *Pawnee D. E. Co.,* 42 Colo. 421, 431–432, 94 Pac. 339 (1908). In *Riverside Water Co.* v. *Sargent, supra,* the court said (p. 235):

> * * * appellant mistakes in assuming, as it apparently does, that the ditch company can be bound only for the interests of those of its

> shareholders who appear and make proof of their several claims; its rights as trustee for all the shareholders, is to establish its claim to all the water owned or controlled by it for their benefit whether the individuals to whom the water is apportionable are before the court or not.

Therefore, when the Sunset Canal Company came in and defended the suit and consented to the 1935 decree fixing its diversion rights, the decree became binding not only on the company itself but also on all its members and their successors. The users of water from the company's ditches cannot individually or collectively insist on greater rights than were decreed to the company itself. It therefore follows that all New Mexico water users, whether parties to the original suit or not, who use water supplied by the Sunset Canal Company are bound by the provisions of the decree determining the diversion rights of that company. They can convey no greater rights to their successors in interest than they themselves possessed.

Fully aware of the consequences of an adjudication against a canal company, appellants seek to thwart the decree by arguing that the Sunset Canal Company is not now a corporation and was not a corporation when the suit was instituted in 1925 (Br. 37–39), and that the decree against the company was therefore a nullity (Br. 33). The contention that the Sunset Canal Company ceased to be a corporation cannot be raised by the present appellants, and if raised will be found to be without merit.

1. *The appellants are estopped to deny the corporate existence of the Sunset Canal Company.*—The Sunset

Canal (or Ditch) Company was organized as a corporation under the irrigation laws of New Mexico in 1903 (R. 131, 241). Both the company and its water users (including the appellants) were named as defendants in the 1925 litigation (R. 3–4). The company entered a general appearance and asked for cross relief, as did the appellants and other New Mexico defendants who had water rights under the Sunset Canal (R. 29–45). Neither the company itself nor the individual water users entered any plea that the corporation had become defunct. In fact they affirmatively represented that the canal company was their diverting agent (R. 39). The Sunset Canal Company signed the "stipulation for and consent to" the entry of the 1935 decree, as did its individual water users (R. II, 6 following the decree; *infra,* pp. 71–72). The Canal Company itself installed the measuring devices required by the decree and the court's subsequent orders (R. 138). For three years it abided by the decree and collected the 13¢ assessments from the water users along its ditches (R. 138–139). It issued shares of stock so its individual members might obtain loans from the Federal Land Bank (R. 200). It elected officers regularly, (R. 132, 194–197). And not until the contempt proceedings were instituted in 1939 did its officers or its members raise the contention that the company had ceased to exist in 1921. In the meantime the Government had conducted an expensive litigation to adjudicate water rights; it had loaned money to the individual water users in reliance on shares of stock issued by the company; and it had constructed a dam at a cost of $5,500,000.00 to impound water for supplemental irriga-

tion of the white- and Indian-owned lands of the San Carlos Project. Act of June 7, 1924, c, 288, 43 Stat. 475.

In view of these facts it is submitted that the appellants and the other users of water from the Sunset Canal are estopped to deny the corporate existence of the Sunset Canal Company. *Tulare Irrigation District* v. *Shepard,* 185 U. S. 1 (1902); cf. N. M. Stat. Ann. (Comp. 1929), sec. 32–229. A corporation may exist by estoppel. 13 Am. Jur. "Corporations," sec. 63. The appellants and other New Mexico defendants, in order to escape the limitations imposed by the 1935 decree, should not be allowed at this late date to say that the corporation is nonexistent.

2. *The Sunset Canal Company is a de jure corporation.*—Even if appellants are not precluded by their conduct from denying the corporate existence of the Sunset Canal Company and even if such an issue may be raised by private litigants, it is submitted that the Company is an existing corporation. Appellants concede that the company was validly organized in 1903 under the name "Sunset Ditch Company" but contend (Br. 37–39) that it has since been dissolved by virtue of an act which declared that "all private corporations" organized under the laws of the Territory of New Mexico and which have failed to file annual reports, as required by the Act of March 15, 1917, N. M. Laws, 1917, c. 112, sec. 6, "be and the same are hereby declared to be dissolved." Act of June 14, 1921, N. M. Laws 1921, c. 185.

The Canal Company was organized under the Act of February 24, 1887, N. M. Laws 1887, c. 12. The Supreme Court of the Territory of New Mexico in *Albuquerque Land Irrigation Co.* v. *Gutierrez,* 10 N. M.

177, 250, 61 Pac. 357 (1900), affirmed 188 U. S. 545 (1903), held that corporations organized under the provisions of that act are not private corporations but "*quasi public servants.*"

Hence it is obvious that the 1921 statute relied upon by the appellants to prove the dissolution of the Canal Company can in no way affect its corporate status since it is not a "private corporation" and therefore not subject to dissolution for failure to file annual reports. It therefore continues to exist as a *de jure* corporation.

Even if the Sunset Canal Company lost its franchise in 1921, yet it has been operating since that time as a "community ditch," and was therefore suable in the same manner as a corporation. N. M. Stat. Ann. (Comp. 1929), secs. 151–414 provides:

> All community ditches or acequias shall for the purposes of this article be considered as a corporation or bodies corporate, with power to sue or to be sued as such.

Parley P. Jones, the president of the Company, testified that the assessments paid Mr. Firth between 1936 and 1939 "were paid by our community ditch. The source of those funds was common contribution of labor assessments. * * * [The Company] is not a corporate entity. It is a community ditch. It is operated by joint efforts of the community. We collect labor assessments. Everybody in the community contributes" (R. 193). He testified that the residents of the valley, at a regular meeting (R. 196), select a committee of representatives to manage and control it (R. 194) and the committee so selected designates from its own number a president and a secretary (R. 196). The

organization thus described is substantially identical with the community ditch whose organization is provided for in N. M. Stat. Ann. (Comp. 1929) secs. 151–414 through 151–438. For such bodies no charter is required; they are not subject to the jurisdiction of the Corporation Commission; but under the statute such a body is, ipso facto, suable as a corporation. Its members are therefore bound by the 1935 decree. See *In re Dexter-Greenfield Drainage District,* 21 N. M. 286, 304, 154 Pac. 382 (1915).

3. *The Sunset Canal Company is in any event a de facto corporation.*—There was a valid law under which the Sunset Canal Company could have organized. It did organize in 1903 (R. 241). And it has transacted since that date, and continues to transact business as a corporation (R. 131, 143). It therefore meets the three requirements for a *de facto* corporation. *Tulare Irrigation District* v. *Shepard,* 185 U. S. 1 (1902).

Therefore, whether viewed as a corporation *de jure, de facto,* or by estoppel, it is clear that the court below did not err, as appellants contend (Br. 37–39), when it concluded that the Sunset Canal Company in 1935 "was, ever since has been, and now is, a corporation doing business in the states of Arizona and New Mexico" (R. 143).

In short, appellants' second main contention that successors in interest are not bound by the 1935 decree is not supported by the law nor by the facts: In the first place, appellants are not successors in interest and cannot plead a defense personal to others. In the second place, injunctions may run against and bind successors

in interest. And in the third place, all persons who use water from the ditches of the Sunset Canal Company are bound by the decree determining the diversion rights of that Company, for that Company is an existent corporation which represented the interests of its several members in the 1925–1935 litigation. Inasmuch as successors in interest in New Mexico are bound by the 1935 decree, the court below did not err "in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit" (Br. 42–43).

III

The contempt proceeding itself was free from error

As their third line of attack, appellants in effect argue that even if the original decree was binding on the New Mexico defendants and their successors in interest, the contempt judgment must nevertheless be reversed because of allegedly erroneous rulings and orders in the contempt proceeding itself (Br. 40, 41–42, 44–45, 46–51, 51–53, 53–55). These several objections to the contempt proceeding are without merit.

A. The court did not err in overruling the motion of Parley P. Jones, R. W. Brooks, and Rachel Jensen to quash process and service upon them in New Mexico as officers of the Sunset Canal Company

The Sunset Canal Company, as a body corporate, and Parley P. Jones, R. W. Brooks, and Rachel Jensen, individually, consented to the entry of the 1935 decree (R. II, Stipulation, p. 6 following de-

cree; infra, pp. 71–72). The voluntary submission of the company and the individuals to the entry of the decree in the first instance obviates any doubt that the Sunset Canal Company and the individuals were then subject personally to the jurisdiction of the court. This being true, the obligations which the court imposed upon them personally were binding upon them even outside of Arizona, and the court's jurisdiction continued as to them for all further proceedings involving the enforcement of the decree. *Leman* v. *Krentler-Arnold Co.*, 284 U. S. 448 (1932); *Aerovox Corporation* v. *Concourse Electric Co.*, 90 F. 2d 615, 617 (C. C. A. 2, 1937). The quotation which the appellants rely upon (Br. 40) from *Robertson* v. *Labor Board*, 268 U. S. 619, 622 (1925), has no bearing in this proceeding. There, Robertson had never been subject to the court's jurisdiction and the question was whether he might for the first time be subjected to the jurisdiction by service of process in a different district from that in which the court was located. Here the appellants and the Sunset Canal Company have subjected themselves to the jurisdiction of the court for the entry of the decree, and are bound under the rule of the *Krentler-Arnold* case. The Supreme Court there held (pp. 454–455):

> As the proceeding for civil contempt for violation of the injunction should be treated as a part of the main cause, it follows that service of process for the purpose of bringing the respondent within the jurisdiction of the District Court * * * was not necessary. The respondent was already subject to the jurisdiction of the court for the purposes of all proceedings that were part of the equity suit and could not escape

> it, so as successfully to defy the injunction, by absenting itself from the district. * * *
>
> In this view, nothing more was required in the present case than appropriate notice of the contempt proceeding, and that notice the respondent received.

Process in the contempt proceedings was served on them as individual landowners and also as officers and directors of the Sunset Canal Company (R. 68–69, 76–77). With respect to the appellants in their individual capacity, service upon them, however made, was sufficient to give them notice of the contempt proceeding.

The question whether the service upon Parley P. Jones, R. W. Brooks, and Rachel Jensen as officers or directors of the Sunset Canal Company was sufficient to subject the company to the contempt proceeding is not an issue presented in this appeal, inasmuch as the Sunset Canal Company is not a party to the appeal. It has been seen elsewhere (*supra,* p. 54) that the company submitted itself to the jurisdiction of the court at the time the original decree was entered, and therefore under the doctrine of the *Krentler-Arnold* case remains subject to the jurisdiction of the court below in subsequent proceedings brought to enforce the decree against the Company and its water users. Hence, it is apparent that the court's action in overruling the motion to quash the service upon Parley P. Jones, R. W. Brooks, and Rachel Jensen as officers or directors of the Canal Company has no materiality to the questions involved in this appeal.

It is to be noted that the Sunset Canal Company at the time of the alleged contempt and at the time process

was served upon its officers was doing business in the State of Arizona as well as in the State of New Mexico (R. 143).

B. The appellants are guilty of disobeying the consent decree and of obstructing the execution of the court's orders

Appellants contend they have disobeyed no lawful decree or command of the court (Br. 46–51). The question whether the 1935 decree was lawful has already been discussed (*supra,* pp. 18–54). The question whether the 1935 decree was disobeyed, and in what respects, requires a few additional comments.

The amended petition, sworn to by the court's Water Commissioner, alleged that the respondents had failed to pay the assessment (R. 52), that the Commissioner thereupon closed the main diverting structures and at various times told the respondents not to appropriate or use any of the water of the Gila River (R. 53); but that nevertheless the respondents had appropriated and used such water (R. 53, 55). The present appellants filed an answer in which they did not deny that they had failed to pay the assessment or that the Water Commissioner had told them not to appropriate or use any water from the Gila River, and admitted that they had since January 1, 1939, continued to use the water of the Gila River (R. 86) in contravention of such order.

On the pleadings before the court, therefore, there was an admitted violation of that part of the court's order which stated:

> It is further ordered that all expenses of the Water Commissioner herein authorized shall be paid by the landowners and for that purpose

> the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. * * * It is further *ordered that all parties,* * * * shall pay their share of the Commissioner's expenses in advance, in two equal installments, * * *. Thereafter, semiannual payments of equal amounts shall be made on the 1st day of January and the 1st day of July, * * * (R. 58–59).

This constituted an order on "all parties" to the decree to pay 13¢ per acre in semiannual installments, and this order was admittedly disobeyed by the appellants.

The decree furthermore had authorized the Water Commissioner to make orders, rules or directions in accordance with and for the enforcement of the decree (R. II, 112; Br. Appx. iv) and he was further ordered "to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre" (R. 59). Pursuant to these orders the Commissioner directed each of the appellants not to use or appropriate any water. This direction was clearly for the purpose of implementing the decree. The appellants' continued use of the water in violation of this order constituted contempt of the court, not only in disobeying the authorized orders of the Water Commissioner but also in obstructing the execution of the court's order that the Commissioner refuse delivery of the water to those who had not paid their assessment. *Toledo Co.* v. *Computing Co.,* 261 U. S. 399 (1923); *Buck* v. *Raymor Ballroom Co.,* 28 F. Supp. 119 (Mass. 1939).

The decree further enjoined the appellants "from asserting or claiming * * * any right, title or interest in or to the waters of the Gila River, * * * except the right specified, determined and allowed by this decree" (R. II, 113; Br. Appx. vi). The use of the water in violation of the decree and of the orders of the Commissioner constituted a claim of rights beyond the terms of the decree, and was therefore a violation thereof. *South Butte Mining Co.* v. *Thomas,* 260 Fed. 814, 818 (C. C. A. 9, 1919), certiorari denied, 253 U. S. 486. Nor can they defend their taking on the ground that the diversions in excess of their adjudicated rights were authorized by a New Mexico Commissioner. There is nothing in the laws of New Mexico "requiring a water user to take all the water a commissioner might allow him." *Sain* v. *Montana Power Co.,* 84 F. 2d 126, 128 (C. C. A. 9, 1936).

Therefore, on the face of the pleadings, there were three admitted violations of the 1935 decree and subsequent orders of the court, namely, a failure to pay the assessments, an appropriation and use of water, and an assertion of water rights beyond the terms of the decree.

The evidence and the court's findings disclose still other violations of the decree and orders of the court. For example, the court's order of December 9, 1935, requires the Water Commissioner to prepare and file with the court "a full and complete report, certified under oath, showing the daily quantity of water distributed to the respective users" for each calendar year (R. 60). The findings show that after the original locks

and recording devices were broken and destroyed the Sunset Canal Company refused to provide "accurate measuring or automatic recording devices, for the use of the Water Commissioner, as provided for in the order of this Court," and that the company refused to allow him access to their recording gauges, or to furnish him "information as to the amount of water diverted from the Gila River, by said respondent and delivered to the lands under its system during the calendar year 1939," and that as a result the Commissioner was unable to furnish the court or the parties to the decree "an accurate and full report" for 1939 (R. 141–142).

The evidence also shows, and the court below so found (R. 141), that the respondents were contumacious in another particular: they caused the locks in the diverting structures and measuring devices to be broken and other locks to be placed thereon. While it is true that they did not do the actual breaking, it is clear that it was done at their instigation. The record shows that the respondents, represented by H. Vearle Payne, Henry L. Smith, Hugh Pace, Parley P. Jones and Robert Mortensen, went before the Interstate Streams Commission and asked for relief from the 1935 decree (R. 185, 198, 224). The subsequent acts of the New Mexico officials stem from the representations there made (R. 225, 227, 132, 232, 234, 240).

C. The court below did not rule that the burden was upon respondents to prove that they were not guilty of contempt

At the outset of the contempt hearing counsel for the respondents argued that since the decree allegedly violated was a consent decree in the nature of a contract, "the burden of going forward" so as to show that the

decree was equitable rested upon the complainants (R. 167–168). This the court denied, stating that it was "incumbent upon the respondents * * * to show cause to purge themselves of the contempt" and directed them to "proceed" (R. 169). This ruling related only to the problem presented by counsel for the respondents and cannot be interpreted as a broad ruling that on all issues of fact, the burden was upon the respondents to prove that they were not guilty of contempt. It was merely a ruling that the verified affidavits and the order to show cause established a *prima facie* case and placed upon the respondents the "burden of going forward with the evidence," an entirely different thing than imposing upon respondents "the burden of proof."

Even had the court made such a ruling, it was correct since upon the pleadings all the defenses set up by the respondents were affirmative and therefore had to be proved by them. There were, it will be recalled, several admitted violations of the decree (*supra,* pp. 57–59). The defenses set up and relied upon by the appellants were that for various reasons the decree was invalid with respect to New Mexican rights, that because the decree was not binding on subsequent purchasers of land it was unequal in its operation and hence impossible of enforcement. The answer further alleged that the diversion of water from the Gila River in contravention of the decree did not injure any water rights in the State of Arizona.

The allegations of these answers failed as a matter of law to constitute a valid defense (*supra,* pp. 18–54). As the matter stood on the pleadings, therefore, the

respondents had admitted facts which constituted a violation of the decree, and the burden was on them to bring forward any matters which would purge them of contempt. *Oriel* v. *Russell,* 278 U. S. 358, 366 (1929); *Cutting* v. *Van Fleet,* 252 Fed. 100 (C. C. A. 9, 1918); *In re Pillsbury,* 69 Cal. App. 784, 788, 232 Pac. 725 (1924). Theirs was the task of proving any matters in confession and avoidance. *In re Cashman,* 168 Fed. 1008 (S. D. N. Y. 1909). The rule in contempt proceedings in this regard is and should be no different from the rule in all other cases whether criminal or civil. Jones, Evidence (4th ed., 1938), secs. 179–180, and cases therein cited. Therefore, even had the court ruled that the burden was on the appellants to purge themselves of their admitted violation of the decree, such ruling would have been proper. Furthermore, there was no dispute as to the material facts.

D. The district court properly rejected appellants' offer to prove that the diversion of water in New Mexico did not injure the water users of Arizona

Appellants contend that the court below erred in refusing to admit testimony that the water, had it not been diverted in New Mexico, would have been lost before it reached Arizona (Br. 41–42). The district court rejected the offer (R. 173) as immaterial since the decree had been admittedly violated. This holding is clearly correct for the question of irreparable injury was conclusively adjudicated by the injunction. It is well settled that absence of injury is no defense in a contempt proceeding. *Wyoming* v. *Colorado,* 309 U. S. 572, 581 (1940); *Red River Valley Brick Corp.* v. *Grand Forks,* 27 N. D. 431, 440, 146 N. W. 876 (1914);

Herring v. *Pugh,* 126 N. C. 852, 857, 861, 36 S. E. 287 (1900); *cf. Miller and Lux* v. *Rickey,* 146 Fed. 574, 575–576 (C. C. Nev. 1906). In *Wyoming* v. *Colorado, supra,* the Supreme Court rejected an indentical contention saying (p. 581):

> Colorado insists that Wyoming has not been injured. But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie River and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights.

None of the cases cited by appellants (Br. 41–42) are relevant because the question of violation of a court decree in a contempt proceeding was not involved. It is submitted, therefore, that the district court properly rejected this evidence.

E. The fine of $100.00 imposed on each respondent was proper

On January 11, 1939, the court authorized the Water Commissioner to employ an attorney in connection with the present matter and to advance him $250.00 for his expenses and $500.00 as a retainer (Water Commissioner Firth's Report for 1939, p. 1; infra, pp. 74–75), and in the same order allowed the Water Commissioner his expenses in connection with the same matters. Subsequently, on September 18, 1939, the court authorized a further advance of $500.00 to be paid to the attorney, "the ultimate amount of said attorney fee and expenses to be determined by this court" (Water Commissioner Firth's Report for 1939, p. 2; infra, p. 75). The Water

Commissioner's financial statement for 1939 shows that pursuant to these orders he had paid John C. Gung'l, attorney, $1,250.00 and had incurred expenses of $346.55, totaling $1,596.55 already spent as a result of the condemnor's violation of the injunction (Water Commissioner Firth's Report for 1939, plate 1; infra, p. 75). On March 11, 1940, the court adjudged thirty-four respondents in contempt of court (R. 143), and ordered thirty-three of them to pay a fine of $100.00 each to be used in defraying "the extraordinary expenses incurred [by the Water Commissioner] in the preparation for and prosecution of respondents in these proceedings; and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree" (R. 146).

It is well established that the court in an action for civil contempt may order a fine to be paid to the complainant as compensation for the time spent and attorneys fees and other expenses reasonably incurred in prosecuting the application for contempt. *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 428 (1923); *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.,* 108 Fed. 873 (C. C. A. 2, 1901), writ of error dism'd 187 U. S. 427 (1903); *Feldman* v. *American Palestine Line,* 18 F. 2d 749 (C. C. A. 2, 1927); *In re Tift,* 11 Fed. 463 (E. D. N. Y. 1881). The amount to be so allowed lies in the discretion of the court and its determination will not be set aside except for abuse of discretion. *Board of Trade of Chicago* v. *Tucker,* 221 Fed., 305 (C. C. A. 2 1915). Although the *Christensen* case,[14] quoted in the

[14] *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.,* 135 Fed. 774 (C. C. A. 2, 1905).

appellants' brief (Br. 52–53) held that this determination could be made only upon actual proof of the expenses of litigation, the decision in that case (p. 782) recognized that such a doctrine was not adhered to in other jurisdictions. Moreover, the subsequent case of *Norstrom* v. *Wahl,* 41 F. 2d 910 (C. C. A. 7, 1930) also cited in the appellants' brief (Br. 53), after discussion and quoting the *Christensen* decision, repudiated its doctrine, stating (p. 914):

> In the very nature of things courts should be able to reach a fair conclusion as to the amount of ordinarily necessary costs and attorneys' fees to be awarded in such a case. We believe that in this simple and, to say the least, quite informal proceeding an award to appellee of $250 for its necessary costs and attorneys' fees incurred in the District Court would be fair compensation.

To the same effect is the decision of this Court in *Union Tool Co.* v. *United States,* 262 Fed. 431 (C. C. A. 9, 1920).

In the present case the court was particularly able to determine reasonable costs and attorneys' fees since it was fully conversant with the progress of the case and was to determine the ultimate fees and expense to be allowed the Water Commissioner and his attorney. The fact that $1,596.55 had already been laid out in the preliminary stages of the case indicates that $3,300.00 was not an unreasonable figure to allow for the total expenses incurred in prosecuting this contempt application. It is obvious that each of the respondents separately caused over $100.00 of these expenses. The

cost of bringing separate contempt proceedings against each respondent would not vary substantially with the amount of water wrongfully taken by any one of them. In a joint action against all the respondents it would have been impossible to show which items of the expense involved in the prosecution were allocable to the violations of each person separately. For this reason it was proper for the court to apportion the total expenses equally among all the respondents by imposing on each a fine of $100.00.

F. The court acted properly in fining the appellants rather than imprisoning them

As set forth *supra* (pp. 57–60) the contempt consisted not only in the respondents' failure to pay the 1939 water assessments but also in taking and using water after the Water Commissioner had shut the locks and ordered them not to use any water, and also in laying claim to water rights in the Gila River over and above those established by the consent decree. Any one of these latter acts were affirmative violations of the decree and warranted the court in imposing a remedial fine for the benefit of the complainant, *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 443–444 (1911).

Even had the contempt lain solely in the appellants' failure to pay the water assessment, however, it was proper for the court to order a remedial fine to reimburse the complainant for his outlay in prosecuting the contempt proceedings. Section 385 of 28 U. S. C. (36 Stat. 1163) provides:

> The said courts shall have power * * * to punish, by fine or imprisonment, *at the discretion of the court,* contempts of their authority.

Section 387 of the same title (38 Stat. 738) similarly provides:

> If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, *in the discretion of the court.* Such fine shall be paid to the United States or to the complainant, * * *.

These statutes expressly authorize the court to exercise its choice in selecting the appropriate form of punishment. While in a civil contempt action the punishment must be remedial, either fine or imprisonment, whichever is appropriate to the situation, is available to the court. In *Feldman* v. *American Palestine Line,* 18 F. 2d 749 (C. C. A. 2, 1927) the court punished a failure to obey a money decree by imposing a fine of $1,500.00 to reimburse the complainant for his expenses and attorneys' fees incurred in prosecuting the contempt action.

In the present case the appellants' failure to pay the water assessment caused the Water Commissioner substantial expenses of litigation. It is proper that these expenses should be defrayed by the persons responsible for their incurment. The fine will also have the incidental effect of discouraging further failure to pay the assessment.

The fact that this proceeding was being used by the respondents to test the validity of the consent decree made it inadvisable to punish them by the drastic remedy of imprisonment, particularly in view of the likelihood that an appeal would be taken. No contention was made by the respondents during the trial that imprisonment was the sole remedy. In fact counsel

for the respondents made the contention that since this was an action for civil contempt, the only punishment that could be meted out was a compensatory fine (R. 206). While it is the appellees' contention that imprisonment was also an available remedy to enforce the payment of the water assessment, it is clear that the imposition of the compensatory fine was proper under the circumstances.

CONCLUSION

It has been shown that the 1935 decree on which the contempt proceedings were based was valid and binding on the New Mexico defendants and their successors, that the appellants have disobeyed the 1935 decree and the lawful orders issued thereunder, and that the contempt judgment itself is free from error. It is therefore respectfully submitted that the judgment of the court below should be affirmed.

NORMAN M. LITTELL,
Assistant Attorney General.
FRANK E. FLYNN,
United States Attorney,
District of Arizona.
H. S. MCCLUSKEY,
VERNON L. WILKINSON,
W. ROBERT KOERNER,
Attorneys, Department of Justice.
GERAINT HUMPHERYS,
District Counsel,
United States Indian Field Service,
JOHN C. GUNG'L,
Of Counsel.

SEPTEMBER 1940

APPENDIX

DECREE

VI

[R. II, p. 86]

That plaintiff has and owns rights in the waters of the Gila River, and in and to the use of said waters, as follows:

* * * * *

(5) [R. II, p. 105] The right, as of the date of priority of not later than June 7, 1924,—and for the purposes of this decree and for them only as of said date—to store the waters of the Gila River in the San Carlos Reservoir of the aforesaid San Carlos Project by means of the Coolidge Dam (said Reservoir and Dam being situate within the San Carlos Indian Reservation) to the extent of the full 1,285,000 acre-feet capacity of said Reservoir at all times when said waters are available above said dam for such storage under the aforesaid priority; and the right in that relation to accomplish and control the release from said reservoir of the waters so stored and thus reduced to ownership, and to conduct the same down the channel of the Gila River to the Ashurst-Hayden and Sacaton diversion dams of the San Carlos Project and there to recapture and divert, and control the diversion of, the same by means of said dams for conveyance in the canals leading therefrom to the above described 100, 546 acres of the lands of said Project for the reclamation and irrigation thereof, and for the supplementation of amounts available therefor at said dams

from the natural stream flow under plaintiff's rights as same are decreed herein, and for State and Federal purposes under act of March 7, 1928 as hereinbefore described.

* * * * *

XI

[R. II, p. 112] That the lands within the Gila River watershed for the irrigation of which rights are decreed herein are arid or semi-arid in character and require irrigation in order that crops of value may be produced thereon; that except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this Decree, to wit: shall be made only at such times as the water is needed upon their lands and only in such amounts as may be required under the provisions hereof for the number of acres then being irrigated; that in cases where by this Decree water is allowed to be diverted by and through any ditch by the owner thereof for another party, the terms of the contractual relations existing between them are not intended to be determined herein; that wherever the total area under a particular canal is decreed more than one water right, each having the same or different priorities or in its different parts having different rights and priorities, the total area may have used upon it all of its several rights in the order of their priorities, subject only to the requirement that no greater net draft on the stream be made than if each right in the order of its priority were used only on the particular lands for which it was originally acquired or reserved; * * *

[R. II, p. 1 following decree]

STIPULATION FOR AND CONSENT TO THE ENTRY OF A FINAL DECREE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN THE CASE OF UNITED STATES OF AMERICA *v.* GILA VALLEY IRRIGATION DISTRICT, ET AL.

Come now the parties hereto, either in person or by their solicitors, and inform the Court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the Court to adopt said decree as its finding herein and that it be entered as its final decree in this cause, settling and adjudicating the rights of the parties hereto.

For the United States of America,

HOMER CUMMINGS,
The Attorney General.
HAROLD L. ICKES,
The Secretary of the Interior.
CLIFTON MATHEWS, F. E. FLYNN,
Clifton Mathews, Esq.,
United States Attorney,
Solicitors for the plaintiff.

June 24, 1935.—April 11, 1935.

* * * * *

[R. 2, pp. 6–7 following decree]

H. A. ELLIOTT, by A. R. LYNCH,
A. R. LYNCH,

H. A. Elliott and A. R. Lynch, Solicitors for the following defendants: * * * R. W. Brooks; * * * Carl M. Don-

aldson; * * * Byron Echols; * * * B. J. Gale; * * * G. Lynn Hatch; * * * Rachel Jensen; R. T. Johns; * * * John B. Jones; Mary Jane Jones; Parley P. Jones; T. V. Jones; Willard E. Jones; * * * Anna H. Lunt; * * * P. L. Lunt; * * * Fenley F. Merrill; Orson A. Merrill; * * * Hans Mortensen; * * * Nancy O. Pace; * * * E. C. Payne; * * * Junius E. Payne; Leslie B. Payne; * * * Ralph Richardson; * * * Orson J. Richens; * * * School District No. 2, County of Hidalgo, State of New Mexico; * * * Henry L. Smith; * * * Florence R. Swofford; Sunset Canal Company; * * * B. Y. Whipple; * * * J. E. Payne, Trustee, Church of Jesus Christ of Latter Day Saints; * * * Milton N. Jensen; * * * Maude Larsen; * * * R. Richens; * * * Nancy A. Smith; and E. Thygerson.

Distribution of Waters of the Gila River by C. A. Firth, Gila Water Commissioner to the United States District Court in and for the District of Arizona, 1939

LETTER OF TRANSMITTAL

SAFFORD, ARIZONA, *February 12, 1940.*

No. E–59—Globe

RE: UNITED STATES OF AMERICA VS. GILA VALLEY IRR. DISTRICT

Honorable ALBERT M. SAMES,
Judge, United States District Court, Tucson, Arizona.

DEAR SIR: I submit herewith the Fourth Annual Report in the above cause on distribution of waters of the Gila River, tabulations of hydrometric data, and analysis of expenditures for the calendar year 1939.

Very truly yours,

(S) C. A. FIRTH,
C. A. Firth,
Gila Water Commissioner.

STATE OF ARIZONA
County of Graham, ss.

I, C. A. Firth, Gila Water Commissioner, hereby certify that the following is a true and correct record of distribution of waters of the Gila River for the calendar year 1939, to the best of my knowledge and belief; furthermore, that the Financial Statement submitted herein is a true and accurate record of all receipts and disbursements for the calendar year 1939.

(Signed) C. A. FIRTH.

Subscribed and sworn to before me this 12th day of February 1940.

[SEAL] (Signed) MIRTRUE HOLMAN,
Notary Public.

My commission expires February 27, 1940.

AUTHORITY

[Report, p. 1]

In the District Court of the United States in and for the District of Arizona

THE UNITED STATES OF AMERICA

vs.

GILA VALLEY IRRIGATION DISTRICT, ET AL.

No. E–59–Globe

ORDER AUTHORIZING EXPENSES

A petition having been heretofore filed in this cause by Charles A. Firth, Water Commissioner, praying an order of this court for permission to employ an attorney to advise him as to his rights as such commissioner under said decree relative to New Mexico State Officials taking possession of the distribution of the waters of the Gila River in New Mexico, and such other advice as he may require from time to time in relation to the interpretation of said decree relative to his duties as such water commissioner, and until the further order of this court, the said appointment to date from January 2, 1939, and for additional expenses of said water commissioner as set forth in said petition; and it appearing to the Court that it is necessary and proper that said commissioner be authorized to incur said expenses for the purposes set forth in said petition;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that said Water Commissioner be and is hereby authorized to employ said Attorney for said purposes and to advance said attorney the sum of $250.00 for his expenses in connection with said matters and the sum of $500.00 as a retainer, the ultimate amount of said attorney fee for said services to be determined by this Court. It is further ordered that said Charles A. Firth, Water Commissioner, be allowed his expenses in connection with the above matters in addition to the allowance for his expenses heretofore made by this Court.

(Signed) ALBERT M. SAMES,
Judge, United States District Court for the District of Arizona.

Dated Tucson, Arizona, January 11, 1939.

EXCERPT OF COURT ORDER OF SEPTEMBER 18, 1939

[Report, p. 2]

The Court authorized * * * $250.00 expenses and $250.00 retainer to be paid attorney as advance, * * * the ultimate amount of said attorney fee and expenses to be determined by this Court.

FINANCIAL STATEMENT FOR 1939

[Report, Plate 1]

* * * * *

DISBURSEMENTS

* * * * *

John C. Gung'l, Attorney (U. S. Court Order 1/[11]/39 & 8/18/39):		
Retainer	$750.00	
Expenses	500.00	
		1,250.00
C. A. Firth, Special Expense (Court Order 1/11/39)		346.55

261786—40——6 U. S. GOVERNMENT PRINTING OFFICE: 1940